Editor's note: Appealed -- dismissed upon agreement of parties, Civ.No. C-87-254-K (D. Wyo. Mar. 23, 1988) -- was as part of 10th Cir. settlement of Ark Land case No. 87-2790 (not an IBLA case)

ARK LAND COMPANY (ON RECONSIDERATION)

IBLA 84-826; 90 IBLA 43 Decided March 11, 1987

Reconsideration of Ark Land Co., 90 IBLA 43 (1985), upon motion submitted by the Bureau of Land Management. W-0146199 and W-0150169.

Affirmed as modified.

1. Coal Leases and Permits: Leases -- Coal Leases and Permits: Readjustment

   The Board of Land Appeals will not reverse as unreasonable a readjustment of a coal lease to establish a 12-1/2-percent production royalty on the value of coal produced by strip or auger methods, since the lessee may seek further rate relief under 30 U.S.C. § 209 (1982) if needed.

APPEARANCES: Brian McGee, Esq., Denver, Colorado, and Blair M. Gardner, Esq., St. Louis, Missouri, for Ark Land Company; Stephen M. Brown, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

This is a reconsideration of this Board's opinion in Ark Land Co., 90 IBLA 43 (1985). In that case, Ark Land Company had appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated July 16, 1984, which readjusted coal leases W-0146199 and W-0150169. The facts of the case, which were set forth in detail in Ark Land Co., are not in dispute.

This Board affirmed the BLM decision with respect to all issues other than the royalty rate to be imposed. The Board declined to affirm the imposition of the 12-1/2-percent royalty rate specified in section 6 of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. § 207(a) (1982). Ark Land Co., 90 IBLA at 51. Instead, the Board remanded the matter to BLM so that BLM could issue a decision applying a royalty rate in conformance with the eventual decision of the United States Court of Appeals for the Tenth Circuit in the appeal of FMC Wyoming Corp. v. Watt, 587 F. Supp. 1545 (D. Wyo. 1984), appeal docketed No. 84-2175 (10th Cir. filed Aug. 29, 1984).

BLM filed a petition for reconsideration of this issue. By order dated February 7, 1986, the Board agreed to reconsider its prior decision and ordered briefing. BLM asked the Board to reconsider its finding in light of the recent decision in Coastal States Energy Co. v. Watt, 629 F. Supp. 9 (D. Utah 1985), appeal docketed No. 86-1301 (10th Cir. Feb. 24, 1986), and the apparent conflict with prior Board cases such as Ark Land Co., 86 IBLA 153, appeal filed, Civ. No. 85-313 (D. Wyo. July 30, 1985). Ark Land Company responded that the Board's holding was proper.

[1] As this Board stated in Spring Creek Coal Co., 94 IBLA 333-34 (1986),

> when an existing coal lease is readjusted, the terms and conditions of the readjusted lease must be consistent with the statutory and regulatory requirements in effect at the time of readjustment. E.g., Coastal States Energy Co., 70 IBLA 386 (1983), aff'd, Coastal States Energy Co. v. Watt, [supra]. The pertinent statutory provision, 30 U.S.C. § 207(a) (1982), provides: "A lease shall require payment of a royalty in such amount as the Secretary shall determine but not less than 12-1/2 per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations." Although the statute allows the Secretary to establish a lower rate in the lease for coal mined by underground methods, the 12-1/2 percent royalty is the lowest rate that can be given in a lease for mining coal by surface methods. This statutory provision is implemented by 43 CFR 3473.3-2 which provides that royalties may be set on an individual case basis but sets a 12-1/2 percent floor, consistent with the requirement of the statute. Subsection (d) of that regulation, however, points out that a lessee may apply for a further reduction of royalty pursuant to 43 CFR part 3480, which implements 30 U.S.C. § 209 (1982).

In Blackhawk Coal Co., 68 IBLA 96 (1982), we discussed the reason for BLM's general application of minimum royalties in coal leases upon readjustment. We noted: "If a lower rate is put into the lease now and economic conditions change favorably during the term of the lease, there will be no opportunity for upward adjustment of the royalty figure until the lease is again ripe for readjustment." Id. at 99. See also Coastal States Energy Co. v. Watt, supra at 32. We further pointed out in Blackhawk that a lessee can obtain short-term royalty relief where it can make the showing required under 43 CFR 3473.3-2(d). See also 43 CFR 3485.2(c). Therefore, we held the BLM approach adequately protects both the interests of the Government in obtaining a fair return and the interest of the lessee in gaining royalty relief where the lessee can establish it is warranted. Thus, the royalty provisions mandated by regulation were properly imposed by BLM. Gulf Oil Corp., 91 IBLA 93, 102 (1986).

We recognize that the U.S. District Court in Wyoming reversed the Board's position on this issue. FMC Wyoming Corp. v. Watt, supra. This case held that the Department could not apply the statutory royalty rate for surface mines of 12-1/2 percent without consideration of the specific factual circumstances of each lease subject to readjustment. Id. at 1548-49. However, the U.S. District Court in Utah expressly disagreed with the Wyoming court's opinion. Coastal States Energy Co. v. Watt, supra at 21 n.14. It affirmed the Board's decision in Coastal States Energy Co., 70 IBLA 386 (1983), finding such FCLAA provisions as the 12-1/2 percent royalty rate apply to pre-existing coal leases. Id. at 22. Both the Wyoming and Utah court opinions are under appeal in the United States Court of Appeals for the Tenth Circuit. It is the Board's practice to apply its own decisional precedent until a binding contrary precedent is established. Pacificorp, 95 IBLA 16 (1986); Spring Creek Coal Co., supra; see Gretchen Capital, Ltd., 37 IBLA 392 (1978). The decision in Ark Land Co., 90 IBLA 43 (1985), is therefore modified to provide that the decision of BLM is affirmed as to all issues. BLM need not issue a royalty rate decision following final decision in FMC Wyoming Corp. v. Watt, supra, unless ordered to do so by the court.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision in Ark Land Co., 90 IBLA 43 (1985), is affirmed as modified by this decision.

R. W. Mullen
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Will A. Irwin
Administrative Judge.